Supreme Court, U.S.
FILED
SEP 28 2001
OFFICE OF THE CLERK

No. 01-365

In the Supreme Court of the United States

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
MARDELL NEREIM
Assistant Corporation Counsel
City Hall, Room 600
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-5337

* Counsel of Record

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the district court's findings that the affirmative action plans implemented by the Chicago Fire Department during the late 1980s and early 1990s were narrowly tailored to redress prior discrimination were clearly erroneous.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	13
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 15, 16

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), cert. granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1401 (2001) (No. 00-730) 24

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) (en banc) 22

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) 21

Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13 (1st Cir. 1998) 14, 18

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 21

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 15, 16

Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997) 21

Dallas Firefighters Association v. City of Dallas, 150 F.3d 438 (5th Cir. 1998), cert. denied, 528 U.S. 1038 & 1046 (1999) 21

Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989), cert. denied, 498 U.S. 897 (1990) 17

Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991), cert. denied, 508 U.S. 1059 (1992) 17

Edwards v. City of Houston, 37 F.3d 1097 (5th Cir. 1994), vacated on other grounds en banc, 78 F.3d 983 (1996) 17

TABLE OF AUTHORITIES—Continued

Page

Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998) 21
Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 14, 18
Exxon Co., U.S.A. v. Safee, Inc., 517 U.S. 830 (1996) 21
Fullilove v. Klutznick, 448 U.S. 448 (1980) 19
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 21
Howard v. McLucas, 871 F.2d 1000 (11th Cir.), cert. denied, 493 U.S. 1002 (1989) 18
In re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995) 22
Jansen v. City of Cincinnati, 977 F.2d 238 (6th Cir. 1992), *cert. denied*, 508 U.S. 911 (1993) ... 17
Local No. 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986) 16-17
Louisiana v. United States, 380 U.S. 145 (1965)... 16
Mackin v. City of Boston, 969 F.2d 1273 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993) 17
Majeske v. City of Chicago, 218 F.3d 816 (7th Cir. 2000), cert. denied, 531 U.S. 1079 (2001) 17
McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir.), cert. denied, 525 U.S. 981 (1998) 17, 18
Middleton v. City of Flint, 92 F.3d 396 (6th Cir.), cert. denied, 520 U.S. 1196 (1996) 21
Miller v. Johnson, 515 U.S. 900 (1995) 16

TABLE OF AUTHORITIES—Continued

	Page
Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994)	17
Scott Construction Co. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999)	21
Shaw v. Hunt, 517 U.S. 899 (1996)	16
Shaw v. Reno, 509 U.S. 630 (1993)	16
Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992)	14, 17, 18
United States v. Doe, 465 U.S. 605 (1984)	21
United States v. Paradise, 480 U.S. 149 (1987)	14, 18
United States v. Virginia, 518 U.S. 515 (1996)	16
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	16
RULE	
Fed. R. Civ. P. 52(a)	21

In the Supreme Court of the United States

No. 01-365

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

These five consolidated cases, filed by the Chicago Firefighters Union Local No. 2 and 93 individual plaintiffs, challenge promotions made in the Chicago Fire Department ("CFD") between 1987 and 1997 to the ranks of fire engineer, lieutenant, captain and battalion chief as part of an affirmative action program. See Pet. App. 17a. The plaintiffs—petitioners in this Court—concede that the CFD engaged in intentional discrimination against African-Americans and Hispanics until the 1980s, and question only whether the affirmative action plans at issue for four promotional ranks in the CFD were narrowly tailored remedies for that conceded discrimination. See Pet. App. 2a. The cases were consolidated for a bench trial held intermittently for nearly two years, which concluded with a finding against petitioners. See Pet. App. 18a. The court of appeals affirmed. See Pet. App. 13a.

The Affirmative Action Plans: In a June 16, 1987 letter, Chicago's Commissioner of Personnel Jesse Hoskins recommended adopting an affirmative action plan for making promotions based on the results of the 1985 fire engineer promotional examination with a goal of 20% African-American and 5% Hispanic promotions, noting that no race-neutral method was available to redress the continuing effects of the CFD's prior discrimination, which had produced gross minority underrepresentation in that rank. Def. Ex. 1-3. Promotions were then made consistent with the recommendation. Joyce Tr. 91.[1] The test scores of the firefighters promoted through affirmative action were within the same statistical range as the scores of nonminorities who would otherwise have been promoted, and as a result there was no meaningful difference between the qualifications of the candidates. Joyce Tr. 99.[2] Under the affirmative action plan, the vast majority (76%) of those promoted from the 1985 engineer list were nonminorities, and all who were promoted were qualified. Joyce Tr. 100; R. 116, Schedule A at 20.

In a July 9, 1987 letter, Commissioner Hoskins also recommended affirmative action promotions based on the results of the 1987 fire captain examination with a goal of 20% African-American and 5% Hispanic promotions, in order to remedy the continuing effects of prior discrimination in that rank. Def. Ex. 2-1. Again, all of those receiving affirmative action promotions had scores that were

---

[1] Deputy Commissioner of Personnel Robert Joyce presented his direct examination through written testimony, which we cite as "Joyce Tr."

[2] This conclusion is based on the concept of a statistical "band," a generally accepted method for determining whether scores on an employment examination are statistically distinguishable. Scores falling within a single band, defined as scores within two times the standard error of difference on an examination, are considered statistically equivalent within a 95% degree of confidence. Joyce Tr. 98-99, Tr. 3372-73.

statistically indistinguishable from the nonminorities who would otherwise have been promoted. Joyce Tr. 122. The vast majority of those promoted were white, and all who were promoted were qualified. Joyce Tr. 123.

In a July 26, 1989 letter, Chicago's new Commissioner of Personnel Glenn Carr recommended that five affirmative action promotions be made to the rank of battalion chief to supplement the rank-order promotions made pursuant to the 1989 battalion chief examination and that the CFD utilize a goal of awarding 20% of all promotions to African-Americans and 5% to Hispanics. Def. Ex. 3-1. Commissioner Carr noted that as a consequence of prior discrimination, there was then only one African-American battalion chief and one Hispanic battalion chief, and that the goals he recommended would help to redress minority underrepresentation caused by that discrimination. *Ibid.* Until July 1992, the City followed this recommendation. Joyce Tr. 140-41. In July 1992, the City adopted a new affirmative action policy for battalion chief, utilizing a goal of promoting African-Americans and Hispanics at 120% of their representation at the rank of captain (the rank from which promotions are made), in order to more closely tailor the goal to actual minority representation at the rank of captain, while recognizing that minority representation in that rank was growing and that the disparity between minority representation at the ranks of captain and battalion chief would diminish only if minority promotions were made in some modest increment above current minority representation at the rank of captain. Joyce Tr. 142. All captains promoted through affirmative action to the rank of battalion chief were qualified and had scores statistically indistinguishable from those they passed over. Joyce Tr. 146-47.

In a July 14, 1992 letter, Commissioner Carr recommended affirmative action promotions based on the results of the 1991 fire captain promotional examination, based on his finding

that minorities were underrepresented at that rank as a result of prior discrimination. Def. Ex. 4-1. Affirmative action promotions were limited to a goal of 120% of the representation of minorities in the rank of lieutenant, the rank from which promotions to captain are made. *Ibid.*; Joyce Tr. 160-61. All persons receiving affirmative action promotions had scores statistically indistinguishable from those they passed over. Joyce Tr. 162. All candidates promoted were qualified, and the vast majority of those promoted were nonminorities. Joyce Tr. 163.

By letter dated December 6, 1993, Commissioner Carr proposed use of affirmative action for promotions based on the results of the 1993 fire lieutenant examination in order to redress the continuing effects of prior discrimination, with a goal of promoting minorities at a rate of 120% of the minority composition of the ranks eligible for promotion (firefighter and engineer), provided that those receiving out-of-rank promotions had statistically indistinguishable scores from those they passed over. Def. Ex. 5-2. All of those who received affirmative action promotions had scores on the examination statistically indistinguishable from those they passed over. Joyce Tr. 176-77. All those promoted were qualified, and the vast majority of those promoted were nonminorities. Joyce Tr. 177-78.

By letter dated December 1, 1994, Commissioner Carr recommended the use of affirmative action for promotions based on the results of the 1994 fire engineer examination in order to redress the continuing effects of prior discrimination in that rank, with a goal of promoting minorities at a rate of 120% of their representation in the rank from which promotions are made (firefighter), provided that the firefighters promoted to engineer on the basis of affirmative action had scores that were statistically indistinguishable from those they passed over. Def. Ex. 6-2. And all such firefighters had scores within the range of statistical

insignificance. Joyce Tr. 188. The vast majority of those promoted were nonminorities. R. 116, Schedule A at 113.

Throughout its implementation of the affirmative action policies adopted for use in connection with the seven promotional examinations at issue in this litigation, the City continued to review the affirmative action plan each time it made promotions to ensure that those promotions remained a narrowly tailored remedy for the continuing effects of prior discrimination in the ranks to which promotions were made. Joyce Tr. 123, 148, 163, 178, 189-90.

Historical Evidence of Discrimination: The district court found that until the 1980s, the CFD had engaged in a pervasive pattern of intentional discrimination against African-Americans and Hispanics. Minority representation in the CFD was artificially reduced by discriminatory hiring and promotional practices and the existence of a hostile working environment that deterred minorities from even seeking employment with the CFD. The district court's findings on this point document the extent to which minorities were discriminatorily excluded from hiring and promotion by the CFD, and for that reason deserve to be set out at some length:

> The evidence established that "purposeful discrimination" was the policy of the City's Fire Commissioner Robert J. Quinn during his tenure from 1957 to 1977. Commissioner Quinn, who only grudgingly began integrating the CFD in 1965 after complaints and public riots against the CFD's racist policies, made clear his racial and ethnic animus in several ways. Commissioner Quinn referred to the CFD's integrated snorkel squads derogatorily as "freedom wagons." In the early 1970s, Commissioner Quinn was explicit in his ethnically biased belief that Hispanics as an ethnic group were not tall enough to fight fires in Chicago. Commissioner Quinn also expressed his resistance to racial integration to James

Winbush, an African-American in the CFD and one of the founders of the African-American Firefighters League, who was known to Commissioner Quinn to be concerned about the CFD's racial discrimination and the hiring and promotion of blacks:

"What are you worrying about them niggers for? They're only going to come in and screw up our job."

During the 20 years of Commissioner Quinn's term as the head of the CFD, as the racial and ethnic population of Chicago increased dramatically, the percentage of minority CFD personnel remained stagnant at less than 5%. Consistent with Commissioner Quinn's expressed prejudices, the pattern of intentional past discrimination by other City officials dealing with CFD applicants continued through that same time period when City officials used the pretext of physical deficiencies such as "heart murmurs," and "flat feet," or pretextual job requirements such as a minimal height requirement to exclude minority applicants to the CFD. Alderman Leon Depres testified at trial how from the mid-1960s to the mid-1970s he continually complained to City officials, including Commissioner Quinn, in writing and in person about the racially discriminatory hiring, promotional and other practices of the CFD to no avail. His complaints were ignored as part of the City's intentional pattern of racial and ethnic discrimination. When the City in 1974 agreed to the entry of a consent decree in a lawsuit brought by the Department of Justice, which established an interim 50 percent minority (black and Hispanic) hiring ratio and a long-range hiring goal to increase the minority composition of the CFD, a hiring freeze was put in effect at the CFD to preclude the consent decree's implementation. To avoid hiring minority firefighters, the CFD hired no firefighters during 1974, 1975, and 1976, even though vacancies existed and funding was

available. Likewise, no promotions were made to any of the CFD promotional ranks during this same period.

In the 1970s, the racial and ethnic prejudices in the CFD were known in Chicago's minority communities, and deterred potential minority applicants who believed job opportunities at the CFD were not available to them. Potential minority applicants also believed that minority firefighters were not appreciated by the CFD because minorities were given more unpleasant assignments than whites. Potential minority applicants viewed firefighting in the CFD as a "white man's job" because of the CFD's intentional discrimination against minorities.

Even after the CFD hiring freeze was lifted in 1977 and the CFD started to hire minorities in greater numbers than before, certain CFD officials still harbored racial and ethnic bias. For example, at a CFD meeting prior to the start of the 1977 training class, the CFD Director of Personnel, who was white, said of minorities, "they can make us hire them but they can't make us keep them." At that meeting, another CFD official, who was white, also said of minorities: "We're not going to allow them to take over this Department."

It is undisputed that those African-Americans and Hispanics who applied and were hired by the CFD performed just as well as whites. In the late 1970s to the early 1980s, those minority members of the CFD found advancement to be slow compared to whites, and found it difficult to obtain good assignments compared to their white counterparts. There appeared to be a sequencing of minorities in the CFD's upper ranks. A minority candidate for promotion would not be promoted to the upper ranks unless another minority vacated the position. Minorities were not given the same opportunity as whites to take the responsibilities of a higher position,

and thereby gain experience that would help minorities advance to the CFD's upper ranks.

A way minorities were intentionally kept from advancing in the CFD was that they received lower promotional scores than whites through the use of subjective efficiency ratings by CFD officials. These subjective efficiency ratings were initially placed in the promotional applicant's scorecard in pencil by the promotional applicant's line supervisor. Efficiency ratings were then altered as consideration of minority applicants moved the CFD command structure. During Commissioner Quinn's term, he had the final say on what efficiency mark a promotional applicant would receive. Minorities historically received lower marks than whites due to Commissioner Quinn's intentional discrimination against minorities. After Richard Albrecht became fire commissioner in 1978, blacks seeking promotion continued to receive subjective performance efficiency ratings substantially lower than whites . . . .

Because of the hiring and promotional freeze from 1974 to 1977, as well as normal attrition from the CFD, by the late 1970s, the CFD was understaffed at all levels of uniformed fire personnel. In the absence of fire officers in certain of the upper ranks of the CFD during this period, lower ranking fire personnel had to "act up" or assume an officer duties above their assigned rankings. These fire officers were not financially compensated for the time when they acted up. Many members of the CFD became dissatisfied with the situation because the lack of manpower increased injuries and fire related deaths and decreased the morale of CFD firefighters. On February 14, 1980, most of the CFD personnel went on strike.

> In attempting to remedy the strike, during meetings among City officials, Local 2 officials, African-American firefighters, and others in 1980, Mayor Jane Byrne had admitted that there had been discrimination in the CFD against minorities and that she was going to change things.

Pet. App. 129a-33a (citations omitted). The 1980 strike produced a new collective bargaining agreement that called for the use of affirmative action to remedy prior discrimination. See Pet. App. 133a-35a.

Also in 1980, the United States filed its second lawsuit attacking employment discrimination in the CFD, this time challenging all of the promotional examinations then in use as violative of Title VII of the Civil Rights Act of 1964, as amended. Joyce Tr. 59-60. City officials concluded that they would be unable to defend the lawfulness of the examinations, and agreed to the entry of a consent decree requiring the City to establish a long-range goal of promoting minorities in sufficient numbers to make each promotional rank more representative of the racial composition of the rank from which promotions are made. Joyce Tr. 60-62, Tr. 3667-69, 3672; Jt. Ex. H-11. The 1985 fire engineer, 1986 lieutenant, 1987 captain, and 1989 battalion chief examinations were the first promotional examinations given subsequent to this decree and, accordingly, the first promotional examinations in which the City employed affirmative action. Joyce Tr. 68, 101, 124, 164.

Statistical Evidence of the Continuing Effects of Discrimination: At trial, Dr. Gerry Suchanek testified in defense of the affirmative action plans as an expert in economics, econometrics, and labor economics. Tr. 917-18; Def. Ex. 17-8. Dr. Suchanek examined the composition of the CFD workforce during the periods in which the affirmative action plans at issue were in use in order to determine whether minority representation in the CFD's

upper ranks was artificially depressed as a result of prior discrimination. Tr. 920-21, 982-85.

Dr. Suchanek opined that during the period of time that the CFD engaged in discrimination against minorities, but for discrimination, minorities would have applied to the department in numbers at least equal to their representation in the outside labor pool because the job required no special qualifications and would have been economically desirable to minorities. Tr. 1058-59, 1062. Moreover, applicant flow data from the 1974, 1978, and 1985 entry-level examinations demonstrated that minorities were qualified for employment since the racial composition of applicants found qualified by these examinations corresponded to the racial composition of the outside labor pool. Tr. 1040-41, 1053; Def. Ex. 17-11.

To determine the rate at which minorities would have been hired prior to 1974 absent discrimination, Dr. Suchanek first identified the racial composition of the qualified and interested outside labor pool during the period of time that the CFD engaged in discrimination. Tr. 987, 989, 1005; Def. Ex. 17-1 at 8. Then, Dr. Suchanek examined the hiring rate between 1985 and 1994, because during this period prior discriminatory barriers had been significantly reduced, if not eliminated. Tr. 1150. He used this analysis in order to account for minority interest in and qualifications for employment and then, finding that the minority hiring rate under this analysis was somewhat lower than minority representation in the outside labor pool, calculated a discounted minority hiring rate to account for the fact that even during a nondiscriminatory period, minorities were somewhat less likely than nonminorities to have been hired by the CFD. Tr. 1156-59. He referred to this discounted minority hiring rate as the "sustainable hire rate," which reflected a minimum estimate of the minority representation in the qualified and interested labor pool. Tr. 1151-52. He considered the rate sustainable because CFD data showed no

significant differences in attrition rates based on race. Tr. 1153-54. Using this sustainable hire rate, Dr. Suchanek then determined that African-Americans and Hispanics were grossly underrepresented in the CFD as a whole and in each promotional rank from 1950 through 1997. Tr. 981, 1094, 4613-14, 4626-36; Def. Exs. 17-1, 17-3, 17-4, 17-27, 17-28. He could identify no nondiscriminatory explanation for this pattern of under-representation. Tr. 982, 2782-83. These disparities persisted through 1993 in the CFD in the ranks of engineer, lieutenant, captain, and battalion chief. Tr. 4629-30, 4635-36.

Dr. Suchanek also identified two reasons for the continued underrepresentation of minorities in the upper ranks of the CFD into the 1990s. First, because most individuals who had been eligible to take the promotional examinations had been hired by the CFD at a time at which it engaged in entry-level discrimination, the pool of promotional candidates was artificially white. Tr. 2028-42. Second, his statistical analysis demonstrated that, until 1985, on average, even those minorities who had been hired were not promoted as quickly as nonminorities. Tr. 3045-46, 4650-51, 4670; Def. Ex. 17-26. Dr. Suchanek could find no nondiscriminatory explanation for this disparity. Tr. 2892-93; Def. Ex. 17-13, 17-27.

The District Court's Decision: In its findings of fact and conclusions of law following trial, the district court credited Dr. Suchanek's analysis, finding that even when the minority hiring rate was discounted to reflect minorities' interest in and qualifications for employment, the evidence demonstrated gross statistical underrepresentation of minorities within the ranks of the CFD "that constitute[s] proof of a pattern of past intentional discrimination within the CFD." Pet. App. 143a. The district court also found that the effects of this prior discrimination continued to be felt when the promotions at issue were made, because most of the pool

of incumbents eligible to take the promotional examinations at issue had been hired during a period of time in which the CFD engaged in intentional hiring discrimination against minorities (Pet. App. 143a-46a), and because the statistical evidence reflected that minority representation at all ranks of the CFD was lower than it would have been had there been no prior discrimination (Pet. App. 146a-52a).

The district court further found that the affirmative action plans at issue were a narrowly tailored remedy. It found that the CFD had no race-neutral alternative available to it to redress the continuing effects of prior discrimination in its upper ranks, since rank-order use of the promotional examinations at issue would not have permitted the CFD to take meaningful remedial action. Pet. App. 153a. The court also found that each of the affirmative action plans were based on a "credible assessment of the need for the affirmative action plan recommended after the results of each examination were analyzed . . . ." *Ibid.* The district court separately analyzed each group of promotions at issue and concluded that they were within the bounds of a narrowly tailored remedy for prior discrimination by redressing the shortfall in minority representation in the upper ranks due to prior discrimination, even when measured by a lowest-plausible bound estimate of the shortfall, while ensuring that ample promotional opportunities remained for nonminorities and that no meaningful difference existed between the qualifications of affirmative action promotees and the nonminorities they passed over. Pet. App. 152a-76a.

The Decision of the Court of Appeals: Affirming the judgment of the district court, the court of appeals first rejected petitioners' argument that the district court's analysis of the rates at which minorities would have been hired and promoted absent prior discrimination was flawed, concluding that there was no evidentiary support for their claim that the CFD required special qualifications for hiring and promoting

firefighters that minorities lacked. Pet. App. 3a-5a. The court also rejected petitioners' argument that narrow tailoring requires nonminorities to be protected against any adverse effects of affirmative action either by being offered financial compensation or additional promotions. Pet. App. 10a-12a. While the court of appeals acknowledged that an affirmative action plan may not unduly burden nonminorities, an undue burden is not present when "the only complaint is about a modest delay in promotion." Pet. App. 12a.

ARGUMENT

It is well settled that the Equal Protection Clause permits state and local governments to use narrowly tailored affirmative action to eradicate the continuing effects of their own prior discrimination. And the district court's detailed findings make clear that this settled principle was correctly applied here. The district court identified not only prior intentional discrimination in the CFD but also the effects of that prior discrimination that continued up to the time the promotions at issue in this case were made. Based on those findings, the court of appeals' conclusion that Chicago may undertake affirmative action until those effects have been eradicated was wholly unremarkable. That holding represents the application of settled principles of equal protection jurisprudence to the particular facts of this case. It is also consistent with the rulings of all other circuits to examine this question. Moreover, the highly fact-bound question whether the district court's findings enjoy sufficient evidentiary support is one of little general significance. While there may well be considerable uncertainty about the extent to which the Equal Protection Clause permits the government to use affirmative action in order to remediate discrimination against minorities in the private sector, a question this Court faces this Term in *Adarand Constructors, Inc. v. Mineta* (No. 00-730), this case does not present that problem. This case involves only settled principles concerning a public

employer's ability to remediate its own prior discrimination through affirmative action. Accordingly, it does not merit plenary review.

1. The district court found that the CFD had engaged in decades of discrimination against African-Americans and Hispanics. This discriminatory course of conduct produced underrepresentation of minorities in the upper ranks of the CFD that continued to the time of the promotions at issue in this case.

The district court identified two causes of the minority underrepresentation in the upper ranks. First, minority hiring was depressed through the use of pretextual hiring practices and the existence of a racially hostile workplace that deterred minority applicants. See Pet. App. 129a-31a, 140a-43a. This, in turn, resulted in underrepresentation of minorities in the promotional ranks as well, since "[d]iscrimination at the entry level necessarily precluded [minorities] from competing for promotions . . . ." *United States v. Paradise*, 480 U.S. 149, 168 (1987) (plurality opinion). Accord, *e.g.*, *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 20-21 (1st Cir. 1998); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1567 (11th Cir. 1994); *Stuart v. Roache*, 951 F.2d 446, 450-52 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992). See also Pet. App. 143a-49a. Second, discriminatory promotional practices further reduced minority representation in the upper ranks. See Pet. App. 131a-32a, 142a-43a. Accordingly, when the affirmative action plans at issue were adopted, minority underrepresentation in the upper ranks of the CFD was not the result of merit-based procedures that accurately assessed the qualifications and interests of minorities for advancement in the CFD, but instead was the product of a pervasive and decades-long effort to exclude minorities from joining and advancing in the CFD.

The district court also found that affirmative action provided the only means available to prevent the CFD's

hierarchy from remaining artificially white for another generation—until all the incumbents hired and promoted under the prior, discriminatory regime had retired. See Pet. App. 152a-54a. By departing from strict rank-order use of promotional examination results, the plans made meaningful progress toward making racial representation of the upper ranks more reflective of what it would have been absent prior discrimination, but without taking measures so aggressive as to unduly trammel the interests of nonminorities.

Petitioners attack the ability of a public employer to redress the continuing effects of its own prior discrimination by claiming that the Equal Protection Clause forbids public employers from undertaking any form of remedial action, no matter how narrowly tailored and no matter how pervasive and extreme the prior discrimination was, once discrimination has ceased. Thus, they argue that affirmative action may "endure only until a validated examination process was in place . . . ." Pet. 13. According to petitioners, the CFD, having finally designed and administered nondiscriminatory examinations in the mid-1980s pursuant to court order, could take no further steps to ameliorate the continuing effects of prior discrimination within its upper ranks. This position is wholly unsupported by the decisions of this Court, and has been rejected by every circuit to consider it.

This Court has consistently taken the view that the Equal Protection Clause permits the government to take affirmative action to redress the continuing effects of prior discrimination even after it has ceased. As the Court wrote in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995): "The unhappy persistence of *both* the practice *and the lingering effects* of racial discrimination against minority groups is an unfortunate reaiity, and the government is not disqualified from acting in response to it." *Id.* at 237 (emphasis supplied). See also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in

the judgment) ("the State has the power to eradicate racial discrimination and its effects in both the public and private sectors and the absolute duty to do so where those wrongs were caused intentionally by the State itself"). Indeed, the Equal Protection Clause recognizes that the government has a compelling interest "in eradicating the effects of past racial discrimination." *Shaw v. Reno*, 509 U.S. 630, 656 (1993). Cf. *United States v. Virginia*, 518 U.S. 515, 547 (1996) ("A proper remedy for constitutional exclusion . . . aims to 'eliminate [so far as possible] the discriminatory effects of the past' and 'to bar discrimination in the future.'" (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (brackets in original)).

Precisely because a public employer has this compelling remedial interest, it follows that "[a] state's interest in remedying the effects of past or present racial discrimination may in the proper case justify the use of racial distinctions." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Accord, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 922 (1995); *Shaw v. Reno*, 509 U.S. at 656; *Croson*, 488 U.S. at 509 (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).[3] That principle is fully applicable

---

[3] Petitioners correctly observe that Justice Scalia has endorsed their view that the government may never use affirmative action to redress the continuing effects of prior discrimination. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in the judgment). But Justice Scalia is the only member of the Court ever to have taken this position. In *Adarand*, for example, seven members of the Court rejected Justice Scalia's view. See 515 U.S. 237; *id.* at 259-64 (Stevens, J., dissenting); *id.* at 269-71 (Souter, J., dissenting); *id.* at 273-74 (Ginsburg, J., dissenting). And in *Croson*, eight justices rejected this view. See 488 U.S. at 509 (plurality opinion); *id.* at 511 (Stevens, J., concurring in part and concurring in the judgment in part); *id.* at 518-19 (Kennedy, J., concurring in part and concurring in the judgment in part); *id.* at 555-61 (Marshall, J., dissenting). Petitioners are also correct that the affirmative action measures that the Court upheld in *Paradise* and *Local No. 28 of the*

here, since rank order use of the promotional lists at issue would have failed to redress continuing minority underrepresentation in the CFD's upper ranks, and hence, as the district court found, no remedy was possible without affording minorities some promotional preference. See Pet. App. 152a-54a.

Nor has petitioners' view enjoyed favor in the lower courts. In fact, no fewer than seven circuits have upheld affirmative action measures under strict scrutiny that continued to provide relief even after nondiscriminatory hiring or promotional practices had been implemented. See, *e.g.*, Pet. App. 10a-12a; *Majeske v. City of Chicago*, 218 F.3d 816, 823-24 (7th Cir. 2000), cert. denied, 531 U.S. 1079 (2001); *Boston Police*, 147 F.3d at 23-25; *McNamara v. City of Chicago*, 138 F.3d 1219, 1224 (7th Cir.), cert. denied, 525 U.S. 981 (1998); *Edwards v. City of Houston*, 37 F.3d 1097, 1112-15 (5th Cir. 1994), vacated on other grounds en banc, 78 F.3d 983 (1996); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-62 (11th Cir. 1994); *Jansen v. City of Cincinnati*, 977 F.2d 238, 242-44 (6th Cir. 1992), cert. denied, 508 U.S. 911 (1993); *Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993); *Stuart*, 951 F.2d at 453-55; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1460-61 (8th Cir. 1991), cert. denied, 508 U.S. 1059 (1992); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989),

---

Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986), envisioned affirmative action only as an interim measure until nondiscriminatory hiring or promotional procedures had been devised, but even petitioners do not claim that those decisions held that the Constitution prohibits remedial action subsequent to the implementation of such nondiscriminatory measures. Indeed, in *Paradise* the dissenters argued that the affirmative action plan at issue was not a narrowly tailored remedy precisely because it would not remain in effect once nondiscriminatory promotional procedures were adopted. See 480 U.S. at 198 (O'Connor, J., dissenting).

cert. denied, 498 U.S. 897 (1990); *Howard v. McLucas*, 871 F.2d 1000, 1008-11 (11th Cir.), cert. denied, 493 U.S. 1002 (1989).

To be sure, the CFD's efforts to remediate prior discrimination lasted for a significant period of time after discrimination in the CFD ceased. Nevertheless, petitioners make no effort to put this fact in context. The CFD had discriminated against minorities for decades, creating massive minority underrepresentation in its upper ranks. Because appropriately tailored affirmative action must work modestly in order to avoid unduly trammeling the interest of nonminorities, remedial affirmative action necessarily operates slowly. Accordingly, the effects of prior discrimination continue to be felt for many decades in an institution such as the CFD.[4] Precisely because the careers of firefighters (especially those who are promoted into the upper ranks) last for decades, prior discrimination will have continuing effects for decades as well—as long as those hired and promoted under the prior discriminatory regime remain on the force. See, *e.g.*, *Paradise*, 480 U.S. at 168 (plurality opinion); *Boston Police*, 147 F.3d at 20-21; *McNamara*, 138 F.3d at 1224; *Ensley Branch*, 31 F.3d at 1567; *Stuart*, 951 F.2d at 450-52.

In short, there is nothing remarkable about the affirmative action plans at issue here, even in terms of their duration.

---

[4] In an effort to expedite relief to some extent, the CFD utilized goals slightly above minority representation in the ranks eligible for promotion—first a goal of 20% African-American and 5% Hispanic promotions, and later goals representing 120% of minority composition in the rank below. In *Paradise*, a majority of the Court agreed that strict scrutiny can permit a goal somewhat higher than minority representation in the rank below in order to expedite relief. See 480 U.S. at 179-80 (plurality opinion); *id.* at 199-200 (O'Connor J., dissenting). In this litigation, petitioners have never attacked the numerical goals as excessive.

The Constitution does not require affirmative action to cease as soon as discrimination ceases; it would scarcely be affirmative action if it did. Instead, narrowly tailored affirmative action is permissible as long as the effects of prior discrimination continue. And contrary to petitioners' claim (Pet. 13-14), the decision below does not endorse unlimited affirmative action; it requires that affirmative action "cease at the point at which the consequences of the past discrimination have substantially dissipated." Pet. App. 6a. The district court's detailed findings demonstrate that the affirmative action plans at issue here were consistent with this rule, which is, in turn, consistent with the decisions of this Court and at least six other circuits. Plenary review is not warranted on this ground.

2. Petitioners also claim that the affirmative action plans at issue were not narrowly tailored because they contain no provision "for 'the *planned* duration of the remedy.'" Pet. 15 (emphasis in original) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 510 (1980) (Powell, J., concurring)). Petitioners acknowledge that the affirmative action plans expired by their terms at the conclusion of "the 'anticipated three year life' of an eligibility list" (Pet. 16), but disparage this as meaningless "boiler-plate language." *Ibid.* What we have said above, however, largely answers this claim as well.

As we explain above, when minority underrepresentation resulting from prior discrimination is pervasive and longstanding, it may take many years to eliminate the continuing effects of that discrimination. In this case, the district court found that all of the affirmative action promotions at issue were made when minority under-representation stemming from prior discrimination persisted in the CFD. See Pet. App. 152a-76a. The court of appeals subsequently concluded that the record supported the district court's findings on this point. See Pet. App. 6a-7a. And the test employed by the court of appeals to assess narrow tailoring was correct–precisely because the Equal Protection

Clause permits public employers to redress the continuing effect of prior discrimination, the "logical stopping point" for remedial action (Pet. 16) is "when the consequences of the past discrimination have substantially dissipated." Pet. App. 6a. Indeed, the court of appeals added that the requirement of narrow tailoring "means that as few white firefighters should have their promotions delayed to make way for blacks and Hispanics as is consistent with remedying the lingering effects of the fire department's long history of racial discrimination." Pet. App. 11a. As we explain above, this approach is consistent with this Court's decisions and the law in all other circuits that address this point. Thus, while the CFD continued to engage in affirmative action even after the initial non-rank-order promotions had been made as envisioned by Commissioner Hoskins' 1987 affirmative action plans for engineer and captain, and by Commissioner Carr's 1989 affirmative action plan for battalion chief, and his 1992 affirmative action plan for lieutenant, this occurred not because affirmative action in the CFD is interminable, but because the effects of prior discrimination continued to be felt.[5]

In any event, petitioners' claim that affirmative action in the CFD has exceeded proper remedial bounds accordingly raises, at best, an entirely fact-bound dispute that is subject to only limited review at this stage of the litigation. While petitioners accuse the CFD of "continuous overreaching" (Pet. 17), the district court found that the affirmative action plans served a proper remedial purpose, and that finding was sustained on appeal. See Pet. App. 6a. Findings of fact should be respected on appeal unless they are clearly

---

[5] Petitioners' claim that Dr. Suchanek testified that affirmative action would be necessary until 2010 or 2015 (Pet. 8) is inaccurate. He testified that as of 1985, "closure" would take 15 to 20 years, predicated on a number of assumptions. Tr. 2290.

erroneous. See Fed. R. Civ. P. 52(a).[6] And this Court is especially reluctant to review factual findings that have already been sustained by a reviewing court. See, *e.g.*, *Exxon Co., U.S.A. v. Safee, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984). Accordingly, petitioners' complaints about the duration of affirmative action are particularly inappropriate for plenary review. The fact-bound question whether the district court's findings on the duration of affirmative action in the CFD are supported by the record is of no general significance either.[7] For these reasons, petitioners' claim does not merit this Court's review.

---

[6] The question whether a public employer has engaged in discrimination is an issue of fact that should be reviewed deferentially on appeal. See, *e.g.*, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). Cf. *City of Pleasant Grove v. United States*, 479 U.S. 462, 469-70 (1987) (findings that municipality's proposed annexation were racially motivated are reviewed deferentially on appeal). Indeed, the circuits to consider the question have unanimously held that even under strict scrutiny, a district court's factual findings should be overturned only if clearly erroneous. See, *e.g.*, *Scott Construction Co. v. City of Jackson*, 199 F.3d 206, 211 (5th Cir. 1999); *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 903 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998); *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997).

[7] The fact-bound nature of this inquiry is illustrated by contrasting this case with those cited by petitioners. In *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir.), cert. denied, 520 U.S. 1196 (1996), the affirmative action promotional plans at issue had lasted even after minority composition at the promotional rank had exceeded minority composition in the rank below. See *id.* at 411. Here, the district court found that in all the ranks at issue, minorities remained underrepresented at the higher rank as a result of prior discrimination when compared to minority representation in the ranks below. See Pet. App. 146a-52a, 154a-76a. In *Dallas Firefighters Association v. City of Dallas*, 150 F.3d 438 (5th Cir. 1998), cert. denied, 528 U.S. 1038 & 1046 (1999), the court concluded that affirmative action was unjustified when "[t]he record is devoid of proof of a history of

3. Petitioners make an even narrower and even more fact-bound argument when they attack the district court's reliance on Dr. Suchanek's testimony, accusing him of improperly presenting a "proportional hiring model" that assumes minorities should be hired and promoted in direct proportion to their representation in the outside workforce. See Pet. 20. But as we explain above, Dr. Suchanek did not advocate a "proportional hiring model," nor did the district court embrace such an approach. Instead, Dr. Suchanek's analysis accounted for the somewhat reduced minority interest in and qualification for employment with the CFD that he found. Accordingly, his model acknowledged that even in a nondiscriminatory system, minorities would have been hired and promoted by the CFD at somewhat lower rates than nonminorities. See Pet. App. 136a-43a.[8]

Petitioners also endeavor to impeach Dr. Suchanek's analysis by claiming that the results of a 1995 entry-level examination demonstrate that absent prior discrimination only

---

egregious and pervasive discrimination or resistence to affirmative action that has warranted more serious measures in other cases." *Id.* at 411 (footnote omitted). Here, however, the district court found a pervasive history of discrimination that had produced enormous minority underrepresentation in the upper ranks of the CFD. See Pet. App. 129a-52a. Finally, in both *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994) (en banc), and *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995), the employer could have developed race-neutral mechanisms in order to ameliorate, if not eliminate, minority underrepresentation. See *Aiken*, 37 F.3d at 1164; *Birmingham*, 20 F.3d at 1546-47. Here, the district court found that no race-neutral alternative was available that could have redressed the continuing effects of prior discrimination. See Pet. App. 152a-54a.

[8] Petitioners are equally wrong to claim that the district court rejected Dr. Suchanek's testimony by utilizing a downward adjustment for the expected minority representation in each promotional rank. See Pet. 19. In fact, this was precisely the approach that Dr. Suchanek had taken in his testimony. See Pet. App. 137a-38a, 142a-43a.

20% of those hired by the CFD would have been minorities. See Pet. 20-21. But as the court of appeals correctly observed, petitioners produced no evidence that this examination adequately reflected what the rate of minority hiring would have been in earlier decades absent discrimination. See Pet. App. 5a-6a. Indeed, the evidence showed that the 1995 examination was of a different character from those used in prior years. In 1995, for the first time, the CFD created separate pools of "well qualified" and "qualified" candidates based on the examination results. *E.g.*, Tr. 2290. Moreover, petitioners' 20% figure is quite misleading in and of itself. That figure represents minority representation in the pool of those deemed "highly qualified" by that examination, but all those who received a score of "qualified" were eligible for employment. Indeed, we are informed that since the trial of this case was completed, the CFD nearly exhausted the "well qualified" pool, and accordingly will commence hiring from the "qualified" pool. And when the qualified pool is examined, it is consistent with Dr. Suchanek's analysis: minorities constituted 47% of the candidates found qualified under the 1995 examination (Def. Ex. 17-11), and the sustainable minority hiring rate identified by Dr. Suchanek and embraced by the district court was only 41-42%. See Tr. 1151-53; Def. Ex. 17-4 at 22. See also Pet. App. 137a-38a, 142a-43a. Thus, the rate at which minorities were found qualified by the 1995 entry-level examination did nothing to impeach Dr. Suchanek's analysis, which if anything is more conservative than warranted in light of the 1995 examination results.

In any event, petitioners make no effort to explain why their attacks on Dr. Suchanek's analysis merit plenary review. The soundness of the district court's reliance on Dr. Suchanek's testimony surely presents no question of general significance. And as we explain above, this Court is especially reluctant to review the findings of a district court

that have already been sustained on appeal, as the findings here have seen.

4. Petitioners briefly allude to the pendency of *Adarand* before this Court, suggesting that the decision in that case may somehow bear on this one. See Pet. 16 n.10. In fact, the issues raised here are wholly distinct from those raised in *Adarand*.

At issue in *Adarand* is whether the federal government may utilize contracting preferences for minority-owned businesses as a remedy for discrimination against such businesses in the private sector. See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-76 (10th Cir. 2000), cert. granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 121 S. Ct. 1401 (2001) (No. 00-730). Whatever uncertainties may exist about the power of the government to remediate discrimination in the private sector through affirmative action, it is well settled that the Equal Protection Clause permits the use of affirmative action to remediate the government's own discrimination, as we explain above. And in any event, *Adarand* does not provide the Court with occasion to reexamine its precedents on that point.

For their part, petitioners suggest only that *Adarand* may bear on the arguments they advance relating to "the durational limits [of affirmative action] under strict scrutiny." Pet. 16 n.10. In fact, in *Adarand* the only argument made along those lines is a claim that the federal program at issue is of effectively unlimited duration because it lacks provisions for removing minority groups from contracting preferences once the effects of prior discrimination have dissipated. See Petitioners' Brief on the Merits at 47-49 (No. 00-730). Here, however, not only do the affirmative action plans expire by their own terms, but the district court's detailed findings demonstrate that all of the promotions at issue served a proper remedial purpose. There may well be many difficulties in reconciling a nationwide contracting program that does not

require an individualized finding that each preference it awards serves a remedial purpose with the dictates of strict scrutiny, but the application of strict scrutiny to employment cases such as this one is clear. When discrete promotions are at issue, the Constitution is satisfied where the promotions have been found to serve a proper remedial purpose, and affirmative action will "cease at the point at which the consequences of the past discrimination have substantially dissipated." Pet. App. 6a.

Petitioners appear to recognize that *Adarand* does not bear in any direct way on this case; even they do not ask that their petition be held until the decision in that case is announced. Nor is there any reason to do so. This massive litigation has remained pending long enough, generating enormous uncertainty in the careers of hundreds of CFD officials who might gain or lose promotions based on its outcome, and exposing Chicago's taxpayers to huge potential backpay liabilities. There is no basis for prolonging this litigation merely to await resolution of the wholly distinct issues before the Court in *Adarand*.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
MARDELL NEREIM
Assistant Corporation Counsel
City Hall, Room 600
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-5337

* Counsel of Record

Attorneys for Respondent

September 28, 2001